IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION (MAIN) NO.142 OF 2007

Shri Anil V. Salgaonkar,
Managing Director of
M/s. S. Kantilal & Co. Pvt. Ltd.,
Salgaocar Chambers,
P.O.Box No.35,
Margao-Goa 403 601 Appellant

V/s

Union of India (Central Government)
represented by B. Ram Mohan,
Deputy Cotroller of Mines,
Indian Bureau of Mines,
New National Highway,
P.O. Fatorda-403 602,
Margao Goa. Respondent

Mr. D. J. Pangam, Advocate for the Appellant.

Mr. J. Vaz, Special Public Prosecutor for the Respondent.

CORAM: N.A. BRITTO

DATE: 28TH JUNE 2007

ORAL JUDGMENT

1. This petition, filed under Section 482 of the Code of Criminal Procedure, 1973, is directed against order dated 12.2.2007 of the Learned Judicial Magistrate, First Class, Margao by which exemption sought for by the petitioner has been refused.

2. The petitioner is the Managing Director of M/s. S. Kantilal & Company Pvt. Ltd., who alongwith the Chief Superintendent of Mines and the Mines Manager of Melca Dongor Mines is being prosecuted for an offence punishable under Rule 58 read with Rules 13(1), 25 and 46 of Mineral Conservation and Development Rules, 1988.

3. There is no dispute that the case filed against the petitioner and the said two accused is a summons triable case. The case has been filed by the Deputy Controller of Mines.

4. Upon summons having been issued to the accused, the petitioner who is accused no.1 in the said case filed an application dated 25.3.2006, under Section 205 r/w section 317 of the Code of Criminal Procedure, 1973 seeking permanent exemption from personal appearance and it is this application which came to be rejected by the impugned order.

5. On behalf of the petitioner/accused, Shri Pangam, the learned Counsel submits that it was not at all imperative for the petitioner to have attended the Court at the hearing including to answer the substance of accusation to be framed against him. Learned Counsel further submits that the complainant also did not show that any prejudice would be caused to the case of the complainant in case the petitioner was exempted. Learned Counsel also

submits that the petitioner is required to travel at various places in India as well as in foreign countries and in case the petitioner is required to go to places on a date when the case is fixed then the petitioner would be compelled to apply for his exemption and in such a case the progress of the case would suffer. In support of his submissions, Shri Pangam has placed reliance on the case of **Bhaskar Industries Ltd. V/s Bhiwani Denim & Apparels Ltd., ((2001) 7 Supreme Court Cases 401)** and also on the case of **Bhaskar Sen V/s State of Maharashtra and others, (2004(4) Mh.L.J. 1115.)**

6. On the other hand Shri J. Vaz, the learned Special Public Prosecutor on behalf of the Respondent/Complainant has submitted that the impugned order has been passed by taking into consideration all the factors in exercise of the discretion given to the Learned Magistrate and, therefore, calls for no interference in exercise of extraordinary jurisdiction.

7. Admittedly, the petitioner is being prosecuted upon a complaint filed by the Deputy Controller of the Mines in a summons triable case.

8. Section 205 of the Code of Criminal Procedure, 1973 provides that “Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to

appear by his pleader". It further provides that "in case the Magistrate inquiring into or trying the case, may in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided.

9. Personal appearance of an accused in a criminal trial is a normal rule and exemption is an exception subject to judicial discretion. In a summons case when there is no question of identity of the accused exemption ought to be generally and liberally granted. The Apex Court in the case of ***B*haskar Industries Ltd.** (supra) has considered the issue of granting exemption at length and has stated thus:-

> "Thus, in appropriate cases the Magistrate can allow an accused to make even the first appearance through a counsel. The Magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the Court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the Court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the Court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking

evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.

A question could legitimately be asked – what might happen if the counsel engaged by the accused (whose personal appearance is dispensed with) does not appear or that the counsel does not cooperate in proceeding with the case? We may point out that the legislature has taken care of such eventualities. Section 205(2) says that the Magistrate can in his discretion direct the personal attendance of the accused at any stage of the proceedings. The last limb of Section 317(1) confers a discretion on the Magistrate to direct the personal attendance of the accused at any subsequent stage of the proceedings. He can even resort to other steps for enforcing such attendance.

The position, therefore, boils down to this: it is within the powers of a Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations on him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the Magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice. However, the Magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course. We may reiterate that when an accused makes an application to a Magistrate

> through his duly authorised counsel praying for affording the benefit of his personal presence being dispensed with the Magistrate can consider all aspects and pass appropriate orders thereon before proceeding further.

10. After considering the case of ***Bhaskar Industries Ltd.***, (supra) this Court in the case of ***Bhaskar Sen*** *(supra)* has issued certain directions and on behalf of the petitioner, reliance has been placed on the following three directions:

> (i) Ordinarily, the Court should be generous and liberal in exercising powers under sections 205 and 317 of the Code and grant exemption to the accused from personal appearance unless presence is imperatively needed or becomes indispensable. While considering the application for exemption, the Court should also bear in mind the nature of accusations and prejudice, if any, likely to be caused to the prosecution or the complainant, if personal attendance of the accused is dispensed with or to the accused if personal attendance is insisted upon, as case may be.
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> (ii) If an accused makes even the first appearance through a counsel, he may be allowed to do so.
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> (iii) If an accused is seeking permanent exemption in a case, the Court, while dealing with such application, should take precautions that the accused gives an undertaking to the satisfaction of the Court that he would not dispute his identity as the particular accused in the

> case, and that a counsel on his behalf would be present in the Court on all dates of hearings and that he has no objection for recording a plea on his behalf of a counsel and in taking evidence in his absence.

11. On behalf of the petitioner, the age of the petitioner was given as 66 years and it was stated that the petitioner was a businessman who was required to travel frequently at various places including Bombay, Delhi, Bangalore, etc. Although the petitioner had also stated that he had some health problem, the same is sought to be explained on behalf of the petitioner, by stating that the said health problem was there at the relevant time and not at present. The learned Judicial Magistrate First Class appears to have been under a mistaken belief that the accused had to compulsory appear in person to answer the plea before he could seek an exemption. The accused need not have done so, since the accused could also be allowed to put his first appearance through a counsel as observed by the Apex Court in the case of **Bhaskar Industries Ltd.**

12. Considering the facts of the case and the law as laid down by the Apex Court in the case of **Bhaskar Industries Ltd.**, (supra) and followed by this Court in **Bhaskar Sen** (supra) the accused ought to have been granted exemption subject to the filing his undertaking as contemplated by the Apex Court.

13. The complaint was for technical offences in which the identity of the petitioner was also not in dispute and no prejudice would have been caused to the case of the complainant . On the contrary in case the accused had sought exemption from time to time that would have certainly delayed the trial of the case rather than expediting the same. Delay in trial is not in the interest of the complainant nor the accused. In view of the above the petition succeeds and so does the application dated 20.3.2006 but subject to the accused filing an undertaking before the Trial Court stating that the accused will answer the substance of accusation through his advocate; that he will not dispute his identity as accused no.1 in that case; that a counsel on his behalf would always remain present in the Court on all dates of hearing; that he would have no objection for recording evidence of the complainant in his absence, and that he will reply to the 313 statement also through his advocate and for which he will have no objection.

14. In view of the above, the petition succeeds. The learned Trial Court is directed to grant exemption to the accused after an undertaking is filed on the above terms to the satisfaction of the Trial Court.

N. A. BRITTO,J.

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